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Ethics as a Fundamental Concept

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I. Introduction

It is commonly assumed that international affairs and ethics make for an uneasy combination. The assumption, accurate enough in its own right¹, is that global politics is a messy affair, with states geared towards guaranteeing their own survival and satisfying their lust for power. Ethical motivations, by contrast, are usually only attributed to non-state actors. Thus, international organizations such as the UN or the World Health Organization are deemed to contribute, in Singh's words, to the 'salvation of mankind'.² Likewise, non-governmental organizations such as Amnesty International, Greenpeace or Oxfam are often seen as driven by ethics, and indigenous peoples are often assumed to be in touch with nature and consequently cannot be bothered by such mundane matters as lust for power. This rosy picture demands serious reconsideration. Non-state actors too are perfectly capable of engaging in ethically problematic acts or omissions – the UN's inactivity in Rwanda two decades ago is but the most obvious example.³ Even the picture of the state as merely power-hungry and unconstrained by any notion of ethics needs a corrective or a nuance: states often profess to be power hungry not (or not only) for the sake of power, but for the sake of guaranteeing the survival of

¹ See, e.g., Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (CUP 2014); Raymond Geuss, *Philosophy and Real Politics* (Princeton University Press 2008).

² See Nagendra Singh, *Termination of Membership of International Organisations* (Stevens and Sons 1958), at vii. But see Jan Klabbers, 'The Transformation of International Organizations Law', (2015) 26 *European Journal of International Law* 9.

³ It has been ascribed to bureaucratic inertia: see Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Princeton University Press 2004).

both the state and its citizens. This may be a self-serving claim, but it contains an ethical element in and of itself: protecting your own citizens against an attack is not something to be dismissed out of hand as somehow unethical. It may be misguided, or narrow-minded, or eventually unjustifiable, but it is not completely divorced from ethical consideration – and there are ethicists who feel that prioritizing those closest to oneself (such as one's compatriots) would be fully justifiable.⁴

Either way, it is sometimes posited that since the late 1990s, a 'turn to ethics' has taken place in international relations.⁵ The intervention over Kosovo, deemed by many to be 'illegal, yet legitimate'⁶ may well be seen as a watershed: it suggested that there are limits to what international law can achieve and can hope for. It followed, that if the law could not tell us how to behave, then we should find inspiration elsewhere, in particular perhaps in ethics. This then, however, creates obvious problems: whose conception of ethics to follow? And can ethics be expected to provide clearer or better guidance than law to begin with?⁷

Be this as it may, the international order – such as it is – is infused with ethics and ethical concerns. Even ignoring a putative 'turn to ethics', most questions can be reformulated as questions of ethics or as having ethical underpinnings, no matter how mundane. Aristotle already realized that most practical issues involve questions of either distributive justice or of corrective justice⁸, and international affairs form no exception. In what follows, I will first sketch just how pervasive ethical concerns may be (section II), after which section III outlines various approaches. Sections IV and V zoom in more closely on virtue ethics, while section VI concludes.

⁴ See, e.g., Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism, and Patriotism* (CUP 2004).

⁵ Martti Koskeniemi, 'The Lady Doth Protest Too Much: Kosovo and the Turn to Ethics in International Law', (2002) 65 *Modern Law Review* 159.

⁶ Exemplary is Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects', (1999) 10 *European Journal of International Law* 1.

⁷ Some of these issues are discussed in Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* (CUP 2013).

⁸ See Aristotle, *Ethics* (Thomson tr., Penguin 1955), 176-9.

II. Ethics in Global Politics

The student of international affairs meets with ethical questions at every turn. Some of these are obvious: is climate change justifiable? Can a state close its borders for large (or even small) flows of refugees? Is the use, or even the mere threat of using, nuclear weapons or other weapons of mass destruction ethically justifiable?⁹

But ethical questions also present themselves in less obvious ways. One example may be the practice of fisheries by European fleets off the African coast, which may or may not affect the chances of survival of local fishermen. Fisheries as such seems relatively free from ethical concerns (at least when fish stock sustainability is left out of consideration and when fisheries are done 'humanely'), but if the practices of some have the effect of crowding others out of the market, the question arises whether those practices can still be considered ethical.

Even acts that are themselves meant to manifest an ethical conception may backfire: a possible example is how the EU delayed the conclusion of a trade agreement with Ukraine recently for human rights reasons (in particular insisting on the release from prison of Yulia Tymoshenko¹⁰), allowing Russia to step into the vacuum and exploit the feelings of unease in Ukraine concerning the EU's dithering. Russia's actions may well be deemed unethical, but the lofty ethical motives of the EU were, mildly put, disappointed, which raises the question whether good intentions alone suffice if the result is less than commendable – and this still ignores the question whether proclaimed ethical intentions are not, really, inspired by pandering to local audiences.

These episodes suggest a couple of things. They suggest, first, that international ethics is an elusive matter: situations that look ethically neutral from one perspective may be riddled with ethical complications from a different perspective. And sometimes the ethics of a situation or an international legal rule remain hidden

⁹ See, e.g., Mathias Risse, *Global Political Philosophy* (Palgrave MacMillan 2012).

¹⁰ As reported by BBC News on 29 November 2013, available at <http://www.bbc.com/news/world-europe-25134682> (last visited 26 March 2015).

from sight. Many have railed against the granting of immunities to the political leadership of states that habitually disrespect human rights; yet one might also suggest that rules on immunities serve the ethical, proto-Habermasian purpose of facilitating communication between states: here then, one ethical conception (to protect human rights) competes with another one (to facilitate the creation of an ideal speech situation). In addition, acts are always embedded in an existing framework for acting, and much unethical behaviour may take place, wittingly or unwittingly, because the framework (the system) is structurally unfair. There is little point on insisting that trade practices remain within trade law if it is trade law itself that is skewed.

Second, ethics can be manifested in several ways and by various means, and contrary ethical imperatives may provoke one another. Perhaps ignoring Ukraine's human rights situation would have been, in retrospect, more ethical than the EU's insistence. Perhaps imposing targeted sanctions on individuals is justifiable in the name of a greater good; but should it come with human rights guarantees that might threaten the achievement of that greater good?

Third, these episodes suggest that evaluation of ethical behaviour (whether acts were ethical or not) is no easy matter. Partly – but only partly - this is because ethics is not formally codified: if legal rules can offer some (relative) certainty for a while, ethics does not.¹¹ Partly this is also because there is no obvious prism to look through: if lawyers can isolate events for purposes of establishing responsibility, ethicists lack this luxury. The lawyer can claim that an import prohibition is illegal if it contravenes a free trade rule. The ethicist may counter that the prohibition was put in place for good reason, but unless the reason itself has found legal recognition (as a recognized exception to the general rule, e.g.), the ethicist's judgment is bound to remain more speculative, more ephemeral, than that of the lawyer. The law, in other words, offers a recognized vocabulary; but the vocabulary does not cover ethics in all respects (although some ethical prescriptions have found legal recognition). Finally, this difficulty in evaluating is partly also caused by the oft-

¹¹ Which is not to suggest that there are no relevant parallels between law and ethics: see generally Peter Cane, *Responsibility in Law and Morality* (Hart 2002).

forgotten circumstance that ethics is not a monolithic concept: acts that abhor some for ethical reasons may seem fairly neutral, or even ethically justifiable, to others. Perhaps the classic example is the humanitarian intervention: duty-based ethical conceptions may argue that there is a duty to intervene if widespread suffering takes place, while consequentialists might argue that one should intervene only if there is a decent chance of success and no expectation of great costs to the intervener.¹²

III. Various Approaches

There is relatively little literature on ethics and international affairs¹³, and what there is tends to focus on specific ethical dilemmas: the putative right to humanitarian intervention or perhaps even, in today's parlance, a responsibility to protect; a possibly absolute prohibition of torture; the discussions on just and unjust wars.¹⁴

As the examples suggest, much of the literature is cast in terms of analyzing and debating specific acts or practices: going to war, committing torture, or intervening for humanitarian reasons. This is no surprise: the two dominant ethical approaches (at least in western ethics) are known as deontology and consequentialism, and both focus on the act - and often the single act, as opposed to acts as part of larger chains of events or practices - as the central unit for analysis. Deontologists, nowadays often inspired in one form or another by the writings of Immanuel Kant, tend to think in terms of duties: the acts of political actors must be evaluated on the basis of duties those actors have, where it is considered less relevant whether they

¹² The point is emphatically made by Peter Singer, *One World: The Ethics of Globalization*, 2d ed. (Yale University Press 2004).

¹³ Not all that much has changed since Hoffmann and Beitz published their seminal works more than thirty years ago: see Charles Beitz, *Political Theory and International Relations* (Princeton University Press 1999 [1979]), and Stanley Hoffmann, *Duties beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse University Press 1981).

¹⁴ The *locus classicus* is Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (Basic Books 2000).

have themselves accepted those duties or whether they spring from some higher source of authority.¹⁵ For consequentialists, taking their cues from John Stuart Mill and Jeremy Bentham predominantly, ethics is a matter of costs and benefits. Actors should act in such a way as to maximize the general happiness, minimize general discomfort, or some variation on either of these. Regardless of the precise yardstick used by consequentialists, what matters is, as with deontologists, the central place of the act: it is the act that is considered subject to evaluation; it is the act that is considered ethical or unethical in the final balance. The reasons or motives behind the act are considered less relevant.

This focus on the act has several practical benefits. Acts tend to be embedded in larger frameworks, but can be isolated from those frameworks: thus, acts become cognizable as units for analysis and evaluation. This also lends the focus on acts an air of objectivity: acts become facts. Focusing on acts carves up the human experience in small pieces which can then be studied from various angles (was the invasion of A by B an act of aggression or of self-defense?) and can be put under a magnifying glass, and can result in findings of guilty or not guilty, responsible or not responsible, blameworthy or innocent.

In a similar way, a focus on acts can help to simplify human existence by limiting demands. The prohibition of murder prohibits the act and, in most cases, the attempted murder, but will not prohibit murderous thoughts. A prohibition of adultery, until recently still found in South Korean law, makes it a crime to have sex outside the marital relationship¹⁶, but does not, as such, prohibit lustful thoughts. By contrast, the commandment not to covet thy neighbour's wife is considerably more demanding.

This last point can be considered an advantage of act-based ethical approaches, but sometimes also generates complications, largely because, as Michael Stocker once

¹⁵ Relevant recent approaches in this vein include John Rawls, *The Law of Peoples* (Harvard University Press 2001); Andrew Kuper, *Democracy Beyond Borders: Justice and Representation in Global Institutions* (OUP 2004), and Simon Caney, *Justice Beyond Borders: A Global Political Theory* (OUP 2005).

¹⁶ See <http://www.theguardian.com/world/2015/feb/26/south-korean-court-to-rule-on-making-adultery-legal> (last visited 17 March 2015).

famously wrote, concentrating on the act alone eventually ignores the vital question why people are spurred into action, and sometimes it is the case that we would wish to condemn acts that are done for the wrong reasons or out of silly motives¹⁷, and can only do so by condemning the act itself. Focusing on the act therewith ends up creating an absolute prohibition.

IV. A Virtue Ethics Approach?

If deontology and consequentialism have long dominated discussions on ethics, in recent decades the classic Aristotelian tradition of virtue ethics has been revived. Once Elizabeth Anscombe had exposed the vapid nature of substantial bits of academic ethics in the mid-1950s, there have been calls to re-consider the virtues.¹⁸ Virtue ethics, by contrast to deontology and consequentialism, concentrates not so much on the ethical qualities of any particular act but, instead, concentrates on the character of the actor and views this as a life-long process – we will see, though, that such an approach can be reconciled with an act-oriented perspective. For Aristotle, if man wanted to lead a flourishing life, he should aspire to be virtuous. A flourishing, happy, excellent life¹⁹ was a life lived in harmony with the virtues, among which he included such virtues as magnanimity, honesty, and friendship. The goal of human life would be to flourish, hence individuals ought to work on their command of the virtues and strive to be as honest, as magnanimous, and as friendly, as possible. These virtues would manifest themselves in particular in public life: while Aristotle did recognize a distinction between public and private life, clearly

¹⁷ See Michael Stocker, 'The Schizophrenia of Modern Ethical Theories', (1976) 73 *Journal of Philosophy* 453. Think, e.g., of launching an invasion in order to produce reality television.

¹⁸ See G.E.M. Anscombe, 'Modern Moral Philosophy', (1958) 33 *Philosophy* 1.

¹⁹ Aristotle used the Greek word *eudaimonia*, for which no direct English equivalent is available but which is variously translated as excellence, happiness or flourishing.

the virtues were supposed to play a role in both, if only because all Athenian citizens were expected to take part in public life.²⁰

Aquinas followed Aristotle's lead and added faith, hope and charity (or love) to Aristotle's list of virtues, and over times others have been added, while some traits are no longer generally recognized as particularly virtuous (wittiness, e.g.). Later thinkers would include a doctrine of the virtues in their work, even if their major orientations would lie elsewhere. Thus, even Kant, that paragon of reason, deontology and imperatives, recognizes the relevance of the virtues, as did David Hume and Adam Smith. This is no coincidence: these thinkers realized that nothing much could come of their own insights into political life if people would lack such things as practical wisdom (what Aristotle called *phronesis*, and Aquinas referred to as *prudentia*). To claim that it is one's duty to do X may well be of importance, but presupposes the ability to recognize that the situation is of the sort that demands doing X. It is one thing to say, amongst internationalists, that an armed attack triggers the right to self-defense, but one must first be able to recognize an armed attack. As the ICJ has suggested, not all uses of force constitute an armed attack.²¹ At least when it comes to *phronesis*, then, virtue ethics was recognized as capable of complementing approaches – perhaps even to the extent, suggested by Martha Nussbaum, that there is no independent role left or necessary for virtue ethics. Virtue ethicists, she suggests (and she should know, often being considered one), are either dissatisfied Kantians aiming to accept that not all is rational, or dissatisfied Humeans hoping to instill some rationality into unbridled passion.²² For Aristotle, the virtues and politics went hand in hand. Still, doing so often raises two particular forms of criticism. First, in Aristotle's days, politics was a small-scale affair. Athens was a small city by present-day standards, and at any rate Aristotle

²⁰ There is a clear connection between his *Ethics* and his *Politics*, and it has been observed that Aristotle's conception of ethics seamlessly integrated in natural philosophy, which was generally purpose-oriented. Women and slaves were excluded however.

²¹ See *Military and Paramilitary Activities In and Against Nicaragua*, (Nicaragua v USA), [1986] ICJ Reports 14, para. 191.

²² See Martha Nussbaum, 'Virtue Ethics: A Misleading Category?', (1999) 3 *Journal of Ethics* 163.

excluded women and slaves, so small wonder that in such a setting the virtues could play a role in public life. In today's globalized world, however, the numbers are simply too big. Aristotelian politics is no longer possible and thus, so the implication runs, his insistence on the virtues in public life is no longer possible either. Thus put, however, the argument confuses baby and bathwater: even if the *polis* and the *agora* are no longer viable options, it still needs to be shown that the virtues can only and exclusively operate in small communities.²³

A second critique will sound more familiar: virtue ethics stem from the Western world, and thus cannot be expected to command universal approval. Surely, the West may think that honesty is a great good, but there is no reason to assume others will too. Again though, the critique conflates baby and bathwater. As the example of honesty may suggest, it is by no means self-evident that non-western cultures would think differently: it might be difficult to identify a culture (whatever that might mean) that would cherish dishonesty. Often, the source of the critique is confusion between values and virtues: the latter are character traits, acquired over a lifetime of training, inculcation and practice (merely deciding to be more honest does not make for greater honesty: one also has to act upon it), and on many occasions, whether in the supermarket or at work, whether towards the family or while driving. Values, by contrast, are adopted political positions: if I decide to be against euthanasia today, I am from now on against euthanasia, but my resolve will rarely be tested. My being against euthanasia has little bearing on how I behave in the supermarket, at work, or while driving. Moreover, I can change my mind next week and modify my position on the topic, but this is unlikely to happen with the virtues: I am unlikely to decide to become less honest next week, and even if I were to make such a decision, I would still need to implement it and behave in dishonest manner. This might not be impossible, but is not lightly to be presumed, also because (so it

²³ It is most likely no coincidence that even those who are sympathetic to the argument that virtue ethics is a predominantly private ethics, nonetheless draw conclusions on public topics, such as for instance environmental issues. An example is Rosalind Hursthouse, *On Virtue Ethics* (OUP 1999).

seems) psychologically man is hard-wired to strive toward virtue rather than strive toward vice.²⁴

A different response was formulated by Alasdair MacIntyre, in his classic study *After Virtue*, first published in the early 1980s.²⁵ For MacIntyre, the virtues were best seen in connection with practices, and practices he defined as more or less coherent and complex cooperative activities whose participants share an understanding of what the practice aims to achieve and what sorts of habits or virtues would be needed to achieve those aims. On this conception, cooking is a practice, but chopping vegetables is not. The notion of practice therewith helps determine what one may legitimately expect from a good cook: the good cook would require such virtues as patience and temperance in order to produce a good meal. Importantly, this evades most criticism about parochialism: the good cook needs the same virtues regardless of whether he or she prepares Thai food, bakes a pizza, or prepares coq au vin.

One problem remained, though: on MacIntyre's conception, it would be difficult to make distinctions between good practices and bad ones. As all practices require some virtues, this might lead hypothetically to applauding the virtuous torturer or genocidaire: it might take considerable courage, patience and perseverance to be a successful torturer, after all, and as with all social practices, one usually gets better with it over time, with the opportunity to hone one's skills.²⁶

In order to prevent having to identify the virtuous torturer, some have further developed MacIntyre's conception by distinguishing between regular and 'false' practices: a practice striving to accomplish evil ends is, eventually, self-defeating. To the extent that practices not merely demand the virtues but also inculcate them (working on being virtuous is, after all, a life-long project), a practice such as torture

²⁴ See Nancy Snow, *Virtue as Social Intelligence: An Empirically Grounded Theory* (Routledge 2009).

²⁵ See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Duckworth 1985).

²⁶ Fuller faced a similar critique after positing that all law has an inner morality: rules internal to the legal order that help distinguish the good legal order from the bad one. See Lon L. Fuller, *The Morality of Law*, rev. ed. (Yale University Press, 1969).

must be deemed 'false': it might take courage to torture, but one does not become more courageous by torturing, but rather less so.

V. The Virtues of Virtue

How then can the virtues be of use to the international lawyer? There are at least three ways in which a virtue ethical perspective may have some resonance. First, it may help *explain* behaviour. Second, the virtues may provide assistance in *evaluating* behaviour, and third, they may *guide* actors in deciding what to do given the circumstances.

As for the explanatory force, this is easy to under-estimate. An obvious example is the practice of mediation. If and when mediation between parties engaged in a conflict of sorts turn out to be successful (i.e. it helps settle the conflict), much may depend on the character traits of the mediator. Mediators, as seasoned practitioners such as Lakhdar Brahimi have found, derive much of their quality from being seen as virtuous.²⁷ Mediators, so Brahimi suggests, should be trustworthy, and this owes much to the virtue of honesty; the mediator who makes false promises will not be trusted.²⁸ Likewise, the mediator who wants to rush proceedings to a successful end will run into problems – patience is indeed, in such settings, a virtue. Hence, the success of mediation can in part be explained by pointing to the virtues of the mediators.

What applies to mediators by and large also applies to the judiciary and other experts. Judges at the International Court of Justice and indeed most international courts are expected to be individuals 'of high moral character', and the United Nations felt the need to draft detailed virtue-demands for those who act as its

²⁷ See Lakhdar Brahimi and Salman Ahmed, *In Pursuit of Sustainable Peace: The Seven Deadly Sins of Mediation* (NYU Center on International Cooperation 2008).

²⁸ Fröhlich offers the striking example of Hammarskjöld mediating in a potentially explosive dispute between the US and China involving captured airmen. See Manuel Fröhlich, *Political Ethics and the United Nations: Dag Hammarskjöld as Secretary-General* (Routledge 2008).

special rapporteurs.²⁹ Admittedly, one reason to respect a court decision may be the circumstance that the judicial institution concerned is generally perceived as trustworthy – but this too depends to some extent on the individual virtues of those occupying the judicial institution.³⁰ It was noticeable, for instance, that some states rapidly lost faith in the International Criminal Court when the acts of its prosecutor were by and large perceived as biased against Africa.

The virtues may also help to evaluate behaviour. Sometimes behaviour might be justifiable in strictly legal terms, and yet be seen as problematic. A striking example is the 2013 judgment of the European Court of Human Rights in *Perincek v Switzerland*, in which the Court agreed with the applicant that a court sentence for denying the Armenian genocide violated the applicant's rights under article 10 of the European Convention on Human Rights. Given the circumstances of the case, the Court could only reach this conclusion by downplaying the Armenian genocide, suggesting that it was not universally recognized as such and thus a Swiss law merely prohibiting genocide denial in general terms was not of such a nature as to justify the limitation on the freedom of expression imposed by the Swiss authorities.³¹

As a technical legal matter, the judgment is no doubt justifiable, and it has been welcomed as upholding the quintessential liberal value of the freedom of expression.³² And yet, it somehow feels wrong to do so at the expense of downplaying the Armenian genocide; and likewise, it seems wrong to ignore the circumstance that the applicant had made a habit of provoking audiences in Europe by claiming that whatever occurred in Armenia a century ago (with an estimated

²⁹ As detailed in Jan Klabbbers, 'The Virtues of Expertise', in Monika Ambrus et al. (eds.), *The Role of 'Experts' in International and European Decision-making Processes: Advisers, Decision Makers or Irrelevant Actors?* (CUP 2014) 82.

³⁰ See, e.g., H. Jefferson Powell, *Constitutional Conscience: The Moral Dimension of Judicial Decision* (University of Chicago Press 2008); Colin Farrelly and Lawrence Solum (eds.), *Virtue Jurisprudence* (Palgrave MacMillan 2008).

³¹ See *Perincek v Switzerland*, Application no 27510/08, judgment European Court of Human Rights, 17 December 2013.

³² See Dirk Voorhoof, 'Perincek Judgment on Genocide Denial', available at <http://echrblog.blogspot.ch/2014/01/perincek-judgment-on-genocide-denial.html> (last visited 26 March 2015).

death toll of 1.5 million people) did not, somehow, constitute genocide. A more sensitive Court would have realized that downplaying the Armenian genocide displayed a lack of empathy; and a more courageous court would perhaps not have hesitated to take the purpose of the applicant's words (to provoke and upset) into account when determining whether his words were worthy of protection.³³

Another example might be the repatriation of many Cambodian refugees to Cambodia in the early 1990s without first asking them whether they wanted to. UNHCR's representative in South East Asia had realized that temporary camps had become permanent settlements, sometimes as big as cities, without any facilities, and without much chance of a solution to the issue. This, he felt, would undermine refugee law generally and would do little to help the refugees, so he arranged with the Cambodian authorities that a large number of refugees could be sent back and would not be mistreated. This flies in the face of refugee law: repatriation, so its most fundamental norm suggests, must always be voluntary. And yet, many have felt that given the circumstances, it was the right thing to do: the UNHCR representative demonstrated a considerable amount of both empathy and practical wisdom.³⁴

Tellingly, it did his humanitarian credentials no harm either: the UNHCR's man on the spot was Sergio Vieira de Mello, who would later be influential in East Timor and eventually lose his life while heading the UN mission in Iraq.³⁵

The explanatory and evaluative roles of the virtues may come together in analyzing complex series of events, and a fine example is offered by ethicist Rebecca Gordon.³⁶ Most studies of torture tend to think of acts of torture as isolated acts. Viewed from deontological and consequentialist perspectives, such acts may or may not be

³³ Switzerland appealed to the Grand Chamber; at the time of writing the appeal is pending. During the appeals stage Armenia intervened.

³⁴ While I tend to interpret Vieira de Mello's behaviour as manifesting a virtuous disposition, it can also be explained in consequentialist terms, with a view to rescuing the integrity of refugee law and therewith safeguarding the interests of contemporary and future refugees.

³⁵ The story is recounted in Samantha Power, *Chasing the Flame: One Man's Fight to Change the World* (Penguin 2008). See also, for snapshots of the person, Alexander Casella, *Breaking the Rules* (Editions du Tricorne 2011).

³⁶ See Rebecca Gordon, *Mainstreaming Torture: Ethical Approaches in the Post-9/11 United States* (OUP 2014).

acceptable, and in particular the so-called 'ticking bomb' scenario is often invoked to suggest that if the benefits (saving thousands of people) seriously outweigh the costs (harming a single individual), torture might be, if not mandatory, at least understandable and justifiable.

Gordon takes things to a different level though by suggesting, inspired by MacIntyre, that torture is best seen not as isolated acts, but rather as a practice, albeit one best characterized as a 'false practice'.³⁷ It aims to achieve a higher goal, and requires something of an apparatus behind it: it requires places where torture can be carried out; it requires skilled torturers, and it requires acceptance by the public at large. Moreover, torture not merely affects the individual being tortured, but also affects his or her torturers, and changes the moral climate in a society therewith affecting all of us. Such a perspective opens the possibility not just of understanding how torture can take place in societies which have officially outlawed it, but also allows an evaluation in terms other than whether or not a single isolated act would be justified. Indeed, the single isolated act comes close to being a contradiction in terms: as with any skill, it takes practice to become a skillful torturer. While occasional single acts of sadism cannot completely be excluded, Gordon's virtue ethics perspective suggests that there may be merit in adopting a virtue ethics approach to studying and analyzing torture.³⁸

The virtues may even serve as guidelines for behaviour, in a non-literal sense. Obviously (or so it would seem), one cannot draft a code of virtues in order to guide action and behaviour: such a code would by definition take on deontological qualities, and therewith be self-defeating. It would contain rules rather than virtues, and succumb to the same problems that rules display generally: they tend to be over-inclusive and under-inclusive, and they never apply themselves.³⁹ Hence, a

³⁷ That said, the distinction she draws between a decent practice and a 'false' practice is not without its problems – problems she glosses over all too rapidly perhaps.

³⁸ A similar perspective is used by Paul Lauritzen, *The Ethics of Interrogation: Professional Responsibility in an Age of Terror* (Georgetown University Press 2013).

³⁹ See generally Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-based in Decision-making in Law and in Life* (Clarendon Press 1991).

'Code of Virtues' would require considerable *phronesis* or *prudentia* in its application.

Sill, there are circumstances where the rules or cost-benefit outcomes might be unclear, yet the virtuous person would know what to do. The most obvious example is that the statesman confronted with a minor boundary incursion would be well-advised not to resort to belligerent measures without waiting to see how the situation develops. The policy adviser calculating that economic development can be achieved only by displacing hundreds of thousands of people may well reach the conclusion that such a solution would be unjust. And the powerbroker keen on imposing sanctions that will lead to great starvation should possibly also think twice, even if imposing sanctions against a corrupt and violent regime may seem like the right thing to do.⁴⁰

VI. To Conclude

In recent years, international lawyers seem to have discovered ethics, both when it comes to legal practice as such and when it comes to broader international affairs.⁴¹ There has been widespread discussion, for instance, of the ethics of arbitration⁴² and of professional ethics for the international bar⁴³, while some have even attempted to formulate a theory of international justice, however thin perhaps.⁴⁴ Much of this is predominantly deontological, and this is no surprise: lawyers are almost by definition deontologists.

Still, international law is no stranger to thinking in terms of the virtues. The classic *pacta sunt servanda* rule, codified in article 26 of the Vienna Convention on the Law

⁴⁰ Veitch has made the point that in such cases, the law ends up being complicit in the tragedy. See Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge 2007).

⁴¹ See generally Donald Childress III (ed.), *The Role of Ethics in International Law* (CUP 2012).

⁴² Catherine A. Rogers, *Ethics in International Arbitration* (OUP 2014).

⁴³ Arman Sarvarian, *Professional Ethics at the International Bar* (OUP 2013).

⁴⁴ Steven R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (OUP 2015).

of Treaties, admonishes the parties to a treaty to adhere to it 'in good faith' – this suggests awareness that legal rules can often be manipulated. Likewise, treaties shall, in the words of article 31 of the Vienna Convention on the Law of Treaties, be interpreted 'in good faith', as treaties can be read (and their meanings manipulated) in nefarious as well as beneficial ways.

Indeed, more generally, there has often been talk about international law comprising a prohibition of the abuse of rights (*abus de droit*): there is some disagreement as to the extent to which this forms of positive international law, but few deny its existence altogether.⁴⁵ Some things, after all, just are plainly wrong, even if the skillful lawyer can find a way to make them seem acceptable under the law. Sometimes the wrong is huge: there can be no excuse for genocide, as the ICJ held in 1994 when it found the Genocide Convention to be binding 'even without any conventional obligation'.⁴⁶ And aggression is difficult to reconcile with 'elementary considerations of humanity', as the same Court held, around the same time, in *Corfu Channel*.⁴⁷ And sometimes the wrong can be small, yet meaningful: triumphantly parading prisoners of war may not strictly be prohibited, but it is difficult to see any virtue in it. Inciting people to rebel against the state they live in and strive for secession may not technically violate any clear-cut legal rule, but is nonetheless something to frown upon. And securing extradition of a convicted killer only to give him a hero's welcome for having killed someone from an enemy state is, likewise, not commendable behavior.⁴⁸ The injunction not to abuse one's rights may be difficult to fit within a positive legal order, but no legal order can do without. At the end of the day, international law is, in Koskenniemi's classic phrase, little more than an elaborate system for deferring substantive resolution elsewhere: into

⁴⁵ The *locus classicus* is Nikolaos Politis, 'Le problème des limitations de souveraineté', (1925) 6 *Recueil des Cours* 83; A more recent discussion is Michael Byers, 'Abuse of Rights: An Old Principle, A New Age', (2002) 47 *McGill Law Journal*, 389.

⁴⁶ See *Reservations to the Convention on Genocide*, advisory opinion, [1951] ICJ Reports 15, 23.

⁴⁷ See *Corfu Channel Case*, [1949] ICJ Reports 4, at 22.

⁴⁸ See <http://www.bbc.com/news/world-europe-19440661> (last visited 24 March 2015).

equity, interpretation , and so on.⁴⁹ In those circumstances, it matters who gets to decide, and if that is the case, then it may be useful to pay some attention not just to whether specific acts are lawful or unlawful, but also to the virtues of those who make the decisions.

⁴⁹ See Martti Koskenniemi, 'The Politics of International Law', (1990) 1 *European Journal of International Law* 1, 28. I have elsewhere suggested that some of Koskenniemi's work can be seen as an attempt to flesh out a role for the virtues: see Jan Klabbers, 'Towards a Culture of Formalism? Martti Koskenniemi and the Virtues', (2014) 27 *Temple International and Comparative Law Journal* 417.